



13 September 2017

Mr Asher Hirsch

BY EMAIL: foi+request-4044-8ed58be9@righttoknow.org.au

In reply please quote:

FOI Request: FA 17/08/01064

File Number: ADF2017/91937

Dear Mr Hirsch

Freedom of Information – Decision on Access

I refer to your email dated 22 August 2017 in which you requested access to documents held by the Department of Foreign Affairs and Trade under the *Freedom of Information Act 1982* (the FOI Act). On 25 August 2017, the Department of Immigration and Border Protection (the Department) accepted full transfer of your request pursuant to section 16(1)(a) of the FOI Act.

1 Scope of Request

You have requested access to the following documents held by the Department:

'The "Implementation Framework for Cooperation to Combat People Smuggling and Trafficking in Persons" signed between Australia and Indonesia in 2010.'

This letter is to notify you of the Department's decision on access to the documents subject to your request.

2 Authority to make decision

I am an officer authorised under section 23 of the FOI Act to make decisions to in respect of requests to access documents or to amend or annotate Departmental records.

3 Information considered

In reaching my decision, I have considered the following:

- The terms of your request
- The documents relevant to your request
- The FOI Act
- Guidelines published by the Office of the Australian Information Commissioner under s 93A of the FOI Act
- Advice from Departmental officers with responsibility for matters relating to the documents to which you sought access

4 Legislation

A copy of the FOI Act is available at <https://www.legislation.gov.au/Series/C2004A02562>. If you are unable to access the legislation through this website, please contact our office for a copy.

5 Documents in scope of request

The Department has identified one (1) document of 17 pages that falls within the scope of your request. The document was in the possession of the Department on 22 August 2017 when your FOI request was received.

6 Decision on access

The decision in relation to the one (1) document in possession of the Department within the scope of your request is to exempt the document in full. The reasons for the decision are set out below.

6.1 **Section 33 of the FOI Act – Documents affecting National Security, Defence or International Relations**

Section 33(a)(i) – Documents affecting National Security

Section 33(a)(i) of the FOI Act permits exemption of a document if disclosure of the document would, or could reasonably be expected to cause damage to the security of the Commonwealth.

For the reasons set out below, I consider that there are real and substantial grounds for expecting that the disclosure of the documents exempted under section 33(a)(i) would cause damage to the security of the Commonwealth.

The term 'security' has an interpretation that can depend upon the circumstances as they exist from time to time.¹ The 'Security of the Commonwealth' is defined in section 4(5) of the FOI Act as follows:

(5) Without limiting the generality of the expression security of the Commonwealth, that expression shall be taken to extend to:

(a) matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth; and ...

I also consider that the definition of 'security' in the *Australian Security and Intelligence Organisation Act 1979* to be relevant.² The Act defines 'security', at section 4, to include:

(aa) the protection of Australia's territorial and border integrity from serious threats

The *Anti-People Smuggling and Other Measures Act 2010* inserted this definition. The relevant paragraph of the Explanatory Memorandum to this Bill outlines that the 'serious threats to Australia's territorial and border integrity' include 'those posed by people smuggling activities'.³

¹ Re *Church of Scientology v Woodward* (1982) 154 CLR 25 at [19].

² See *Staats and National Archives of Australia* [2010] AATA 531 at [99].

³ See www.legislation.gov.au/Details/C2010B00041/Explanatory%20Memorandum/Text

I consider that the disclosure of the information contained within the document that I regard as exempt under s 33(a)(i) could cause damage to the security of the Commonwealth by compromising operational functions in relation to anti-people smuggling activities. I consider the particular damage to the security of the Commonwealth to be the disclosure of international capacity building and information sharing arrangements. I note that the *Implementation Framework for Cooperation between the Government of the Republic of Indonesia and the Government of Australia to Combat People Smuggling and Trafficking of Persons* forms a significant component of Australia's border protection and national security strategy.

I am satisfied that, on the balance of probabilities, disclosure would, or could reasonably be expected to, cause damage to the security of the Commonwealth.

I am therefore satisfied that material identified in the documents as subject to section 33(a)(i) is exempt.

Section 33(a)(iii) - Documents affecting International Relations

Section 33(a)(iii) of the FOI Act exempts a document from release where its disclosure would, or could reasonably be expected to, cause damage to the international relations of the Commonwealth.

The phrase 'international relations' has been interpreted as meaning the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them.⁴ The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information; the circumstances in which it was communicated; and the nature and extent of the relationship. There must be real and substantial grounds for the conclusion that are supported by evidence.

The document includes information about a foreign government and provides an insight into the Australian Government's relationship and cooperation with that foreign government regarding people smuggling and trafficking in persons. It is important for Australia to maintain good working relationships with its coalition partners.

I consider that the disclosure of the document would disclose information that is expected to adversely impact upon Australia's relations with that foreign government, subsequently rendering the foreign government and its agencies less willing to cooperate with the Australian government in the future. In reaching this assessment I have had consideration to the foreign government's previous advice about the handling of material concerning it.

I am satisfied that material identified in the documents as subject to section 33(a)(iii) is exempt.

Section 33(b) - Documents containing information communicated in confidence

Section 33(b) provides that a document is an exempt document if disclosure would divulge information or matter communicated in confidence by a foreign government, an authority of a foreign government or an international organization to the Commonwealth.

The Information Commissioner's Guidelines states that information is communicated in confidence by or on behalf of another government if it was communicated and received under an express or implied understanding that the communication would be kept confidential. Where the information is, in fact confidential in character and whether it was communicated in circumstances importing an obligation of confidence are relevant considerations.

⁴ Re *McKnight and Australian Archives* [1992] AATA 225

The relevant time for the test of confidentiality is the time of communication of the information, not the time of the request for access to that communication.

An agreement to treat documents as confidential does not need to be formal. A general understanding that communications of a particular nature will be treated in confidence will suffice. The understanding of confidentiality may be inferred from the circumstances in which the communication occurred, including the relationship between the parties and the nature of the information communicated.

Having considered these factors, I am satisfied that the information contained within the documents subject to this request and marked 's33(b)' was communicated in confidence by the foreign government under an understanding of confidentiality. There was clear general understanding between the relevant parties that the communication would be treated in confidence.

I am satisfied that material identified in the documents as subject to section 33(b) is exempt.

7 Your Review Rights

Internal Review

If you disagree with my decision, you have the right to apply for an internal review by the Department of my decision. Any request for internal review should be made within 30 days or such further period as the agency allows following notification of the decision. Where possible please attach reasons why you believe review of the decision is necessary. The internal review will be carried out by an officer other than the original decision-maker.

Applications for review should be sent to:

Freedom of Information
Department of Immigration and Border Protection
PO Box 25
BELCONNEN ACT 2617

Or by email to: foi.reviews@border.gov.au

Review by the Office of the Australian Information Commissioner

You may apply directly to the Office of the Australian Information Commissioner (OAIC) for a review of this decision. You must apply in writing within 60 days of this notice. For further information about review rights and how to submit a request for a review to the OAIC, please see Fact Sheet 12 "Freedom of information – Your review rights", available online at <http://www.oaic.gov.au/freedom-of-information/foi-reviews>.

8 Making a Complaint

You may complain to the Australian Information Commissioner about action taken by the Department in relation to your request.

Your enquiries to the Australian Information Commissioner can be directed to:

Phone 1300 363 992 (local call charge)
Email enquiries@oaic.gov.au

There is no particular form required to make a complaint to the Australian Information Commissioner. The request should be in writing and should set out the grounds on which it is considered that the action taken in relation to the request should be investigated and identify the Department of Immigration and Border Protection as the relevant agency.

9 Contact

Should you wish to discuss this decision, please do not hesitate to contact the FOI Section at foi@border.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Alexandra Stevenson', with a long horizontal flourish extending to the right.

Alexandra Stevenson
Authorised Decision Maker
Freedom of Information Section
Department of Immigration and Border Protection